EMPLOYMENT TRIBUNALS

Claimant:	**Dr J Gosalakkal**
Respondent:	**University of Leicester NHS Trust**
Heard at:	Leicester Hearing Centre, 5a New Walk, Leicester, LE1 6TE
On:	4 March 2020
Before:	Employment Judge Adkinson sitting alone
Appearances	
For the claimant:	In person
For the respondent:	Mr A McGee, Counsel

JUDGMENT

After considering the representations of both parties, the Tribunal orders that the claimant must pay to the respondent the following sums:

1. £47,088.04 as the assessed costs of the case, and
2. £5,531.50 as the summarily assessed costs of this hearing.

REASONS

Background

1. Dr Gosalakkal presented a claim to the Employment Tribunal on 7 January 2012. It was for ordinary unfair dismissal, breach of contract and for both detriment and automatic unfair dismissal resulting from alleged protected disclosures that he made to the respondent.
2. The case came for a full-merits hearing in late 2014 before Employment Judge Ahmed sitting with Mr D Stopford and Mr N Khan OBE. They made their findings of fact and dismissed the claims.
3. There have been numerous subsequent hearings before the Tribunal and the Employment Appeal Tribunal in this case. I will cite only those that appear relevant.
4. On 13 May 2015 Employment Judge Heap heard and determined the respondent's application for costs. She ordered that:

4.1. it was appropriate to make an order for costs in favour of the Respondents on the grounds of unreasonableness in respect of the complaint of detriment and automatic unfair dismissal because of making protected disclosures, but

4.2. there would be no order for costs in respect of

4.2.1. the ordinary unfair dismissal claim

4.2.2. the claim for breach of contract, and

4.3. in any case there will be no account taken of costs that the respondent incurred before 27 May 2013.

5. There was an appeal against this decision but Simler J dismissed it.

6. On 11 April 2017 Employment Judge Heap conducted a detailed assessment. She determined that the costs were proportionate and relied in particular on the fact that Dr Gosalakkal valued his claim at in excess of £2 million. She determined that Dr Gosalakkal should pay 80% of the costs.

7. Dr Gosalakkal appealed against that decision to the Employment Appeal Tribunal. The appeal was heard by His Honour Judge Richardson sitting with Mr PM Hunter and Mr A Stanworth on 11 January 2019 (**UKEAT/0114/18/DA**).

8. On 4 July 2019 the Employment Appeal Tribunal allowed the appeal. In very brief terms, the Employment Appeal Tribunal concluded that the Tribunal had placed too much weight on Dr Gosalakkal's own valuation of his claim and that the Tribunal had erred in ordering the payment of 80% of costs. After receiving further representations, the Employment Appeal Tribunal remitted the matter for a new employment judge to determine if the costs were disproportionate and how much Dr Gosalakkal should pay of those costs. I am that new employment judge.

9. The Employment Appeal Tribunal set out the background facts of the case and the Tribunal's decision at the full merits hearing in paragraphs [2] to [10]. I adopt that summary of the background facts in full for the purposes of these reasons.

Pre-hearing

10. Before the hearing began and before I began my reading in, I became aware that Dr Gosalakkal had applied for a reconsideration of the Tribunals decision at the full-merits hearing because of potentially relevant new evidence. In January 2020 Employment Judge Ahmed dismissed this application for a reconsideration. Dr Gosalakkal has appealed that dismissal.

11. I asked the parties to express views in writing about whether the case should proceed. The respondent was keen for it to proceed. Dr Gosalakkal appeared to be more ambivalent. However, he suggested that any delay would adversely impact on him because the respondent had the benefit of an interim charging order over his property. The County Court had stayed the question of whether to make it final pending the outcome of this costs application. I decided in the circumstances it should proceed because both parties would benefit from the certainty. The parties would know the figure

and the County Court could then, if it so chose, resume the proceedings. On the other hand, it was unclear when the Employment Appeal Tribunal may hear the appeal and it was unfortunately unlikely to be in the near future. The alternative delay would be adverse to both parties.

12. When I finally began reading in I noted that the decisions as to proportionality of the amount of costs had been taken by applying the **Civil Procedure Rules 1998 (as amended)** in their form with effect from 1 April 2013. These new rules on assessing proportionality differ markedly from the old rules. However, I was aware that **CPR rule 44.3(7)** created a transitional provision that in effect applied the rules as they stood immediately before 1 April 2013 to costs in cases that began before 1 April 2013. I wrote to the parties and asked them to consider the point and to be prepared to address it at the final hearing and/or make any representations in writing before that. This was unfortunately only a few days before the hearing but both parties replied. I decided the matter at the hearing itself.

The hearing

13. Dr Gosalakkal represented himself. Mr A McGee, Counsel, represented the respondent. Mr McGee had prepared a skeleton argument and a supplementary skeleton argument dealing with the issue of which rules apply. Dr Gosalakkal had prepared written submissions and submitted a number of documents including helpfully the Employment Appeal Tribunal's decisions. Each made oral representations. I have taken those into account.

14. The parties replied with speed to my enquiries.

15. I am grateful to the efforts they went to in order to prepare and the speed that they replied to my enquiries. I am grateful also to them for their oral submissions. Their efficiency meant that the Tribunal was able to conclude the hearing in 1 day and not therefore require the second day allocated to hear the matter.

16. With the help and agreement of the parties I identified 3 issues for me to determine. I have set these out below.

17. Though these reasons are composite, at the hearing and with the agreement of the parties I dealt discreetly with each issue giving a judgment after each issue, rather than with everything in one go. That was to enable the parties to be clear what was under consideration at any one time and enable me to deal more efficiently and clearly with the issues before me. Furthermore, the answer to the first issue set out below (the rules issue) determined the approach to take in relation to the second issue set out below (the proportionality issue). Furthermore, if the costs were disproportionate it would require the court to review the costs ordered which would have to be done before considering the third issue (the disentanglement issue).

Issues

18. The issues for me to determine are as follows:

    18.1. Which version of the rules applies to this case ("**the rules issue"**)?

18.2. Are the costs claimed proportionate in accordance with the relevant version of the **CPR** ("**the proportionality issue"**)?

18.3. Of the costs that the respondent incurred, what amount of them relates to the protected disclosure claims after 27 May 2013 that Employment Judge Heap has ordered that the claimant should pay (**"the disentanglement issue"**)?

The rules issue

19. When assessing costs, the Tribunal must apply the same principles as the County Court: **Employment Tribunal rule 78(1)(b)**.

20. Costs in the County Court are governed by the **Civil Procedure Rules 1998** (as amended)("**CPR**")

21. On 1 April 2013 there was a significant change to the rules as part of what is known as "The Jackson Reforms". Many rules were simply moved and renumbered with minimal modification. However, there was a big change to the rules on assessing costs on a standard basis and an indemnity basis. In very simple terms the rules that came into force on 1 April 2013 require that on a standard basis the proportionality of the costs is foremost. Proportionality is assessed by reference to factors found now in **CPR rule 44.3(5)**, which is new, and **CPR rule 44.4**.

22. The **CPR** as enacted with effect from 1 April 2013 apply to these costs proceedings: **The Civil Procedure (Amendment) Rules 2013 rule 2**.

23. However, **CPR rule 44.3(7)** provides:

"(7) Paragraphs (2)(a) and (5) do not apply in relation to—

"(a) cases commenced before 1st April 2013; or

"(b) costs incurred in respect of work done before 1st April 2013,

"and in relation to such cases or costs, rule 44.4(2)(a) as it was in force immediately before 1st April 2013 will apply instead."

24. In **Harrison v University of Hospitals Coventry and Warwickshire NHS Trust 2017 1 WLR 432**, in a case that concerned **CPR rule 44.3(7)** and when for the purpose of that rule a civil case commenced, Davis LJ said **[62]**:

"In my view, therefore, it is plain that a case is "commenced" for the purposes of **CPR rule 44.3(7)(a)** when the relevant proceedings are issued by the court."

25. The case seems to have proceeded on the basis that it is the post-April 2013 version of the **CPR** that apply. The respondent agrees that, applying **Harrison** by analogy to proceedings in the Employment Tribunal, it is the pre-1 April 2013 rules that apply to this case.

26. Dr Gosalakkal raises the concern however as to whether or not it would be fair to apply the old rules given that everyone has been proceeding on the basis that the new rules apply. He also points out that the Employment Appeal Tribunal itself proceeded on the basis that the rules applied (see **[47]** of its judgment).

27. After careful consideration I have concluded that I must apply the rules as they existed pre-1 April 2013. My reasons for that are as follows.

28. Applying the case of **Harrison** by analogy to Employment Tribunal proceedings it must be the case that Tribunal proceedings are commenced when they are presented to the Employment Tribunal. There is no other obvious or logical date.

29. The key date therefore is 7 January 2012 when Dr Gosalakkal presented his claim to the Tribunal.

30. Applying **CPR rule 44(3)(7)** therefore it is the rules as they stood pre-1 April 2013 that are applicable.

31. I am conscious that I am deciding to apply rules pre-1 April 2013. I am also conscious that this issue has not been raised before and that everyone has proceeded based on the rules as they currently stand after 1 April 2013. I am also conscious that it may appear I am disregarding the Employment Appeal Tribunal's decision. However, I believe the decision to apply the rules as they stood before 1 April 2013 is the correct one notwithstanding those obvious concerns.

32. While the Employment Appeal Tribunal's decision is explained its decision by reference to the post 1-April 2013 rules it seems to me the ratio of the Employment Appeal Tribunal's decision is not that the post-1 April 2013 rules apply but that Employment Judge Heap was wrong when she proceeded on the basis that Dr Gosalakkal's claim was worth over £2million when she was considering the value of the claim. I believe that nothing in my decision on this issue goes against that ruling. It does not appear that the parties drew the Employment Appeal Tribunal's attention to the rule and so did not ask the Employment Appeal Tribunal to decide which version applies. A claim's value – or real value – is a relevant factor under the pre-1 April 2013 rules and so the Employment Appeal Tribunal's decision is still plainly binding insofar as it concerns the question of how to approach the appropriate valuation to Dr Gosalakkal's claim.

33. As the issue was not ruled upon by the Employment Appeal Tribunal I must give effect to the decision of the Court of Appeal in **Harrison v University Hospitals NHS Trust**. Furthermore, I must give effect to the rules as drafted by the Civil Procedure Rule Committee and laid before Parliament. I can only do that by applying **CPR rule 44.3(7)** to this case and therefore applying the **CPR** as it was immediately before 1 April 2013.

34. The consequence of applying the old rules is that:

    34.1. **CPR rule 44.3(2)(a)** (which in very simple terms is the rule that proportionality trumps reasonableness and necessity) does not apply; and

    34.2. **CPR rule 44.3(5)** (which defines costs as proportionate if they bear a reasonable relationship to 5 factors including the sums in issue) does not apply.

The proportionality issue

35. The total costs bill as assessed by Employment Judge Heap in the sum of £95,176.07. That is before the question of disentanglement, the costs of the assessment and the deduction of any deposit paid. This figure does not include any costs from before 27 May 2013.

36. **CPR 44.4** applies to the case even though it came into force after 1 April 2013. This is in fact a re-enactment of **CPR rule 44.5** as it stood immediately before 1 April 2013 with the addition of a reference to costs budgeting. Costs budgeting is a process under **CRP Part 3** that has no relevance to the Tribunals. Therefore, the rules are for all relevant purposes the same.

37. Costs are being assessed on the standard basis. Therefore, if I have any doubt I must resolve it in favour of Dr Gosalakkal as the paying party: **CPR rule 44.3(2)(b)**.

38. **CPR rule 44.4** provides:

> "(1) The court will have regard to all the circumstances in deciding whether costs were—
>
> "(a) if it is assessing costs on the standard basis—
>
> "(i) proportionately and reasonably incurred; or
>
> "(ii) proportionate and reasonable in amount, or
>
> "…
>
> "(2) In particular, the court will give effect to any orders which have already been made.
>
> "(3) The court will also have regard to—
>
> "(a) the conduct of all the parties, including in particular—
>
> "(i) conduct before, as well as during, the proceedings; and
>
> "(ii) the efforts made, if any, before and during the proceedings in order to try to resolve the dispute;
>
> "(b) the amount or value of any money or property involved;
>
> "(c) the importance of the matter to all the parties;
>
> "(d) the particular complexity of the matter or the difficulty or novelty of the questions raised;
>
> "(e) the skill, effort, specialised knowledge and responsibility involved;
>
> "(f) the time spent on the case;
>
> "(g) the place where and the circumstances in which work or any part of it was done; and
>
> "…"

39. I will apply the following process to assessing the question of proportionality.

39.1. I will consider the figure of the total bill as assessed by Judge Heap and decided whether or not it is proportionate. She has in a previous hearing already analysed the bill in detail dealing with the points of dispute that Dr Gosalakkal took in relation to the bill that the Respondent submitted. The Employment Appeal Tribunal has not remitted that aspect of the detailed assessment.

39.2. If I decide the figure is not globally proportionate then I will have to consider whether I need to reopen the bill for further analysis to assess if certain items were necessary.

39.3. If the figure is globally proportionate then because Employment Judge Heap has already determined what sums are reasonably incurred and reasonable in amount in line with the points of dispute (since that aspect of the costs rules is the same) and because that issue was not remitted I will not reopen the bill.

40. It seems to me that approach is a pragmatic way forward based on the rules and how detailed assessments were conducted before 1 April 2013.

41. In my judgment such approach is as consistent as the circumstances allow with the approach set out in **G M Broamy v J M C Holdings Limited [2002] EWHC 2932 (QB)** and also falls in line with the narrative in **Cook on Costs** at **[28.49]**.

42. Such an approach is also proportionate to the issues in dispute and may save expense and so is in line with the overriding objectives of both the **CPR** and Tribunal's own rules.

43. Dr Gosalakkal did raise a view that he felt he should not have to pay the costs in any event. He feels strongly that it is wrong he should have to pay them. However, Employment Judge Heap decided that he must pay costs in accordance with her order. The Employment Appeal Tribunal has not remitted that matter to me. I am not entitled to deal with the principle of whether or not he should pay those costs. In detailed assessment proceedings, the assessing judge is not entitled to go behind the fundamental costs order that gave rise to the detailed assessment: **Cope v United Dairies London Limited [1963] 2 QB 33 EWHC(QB)**.

44. I have also to determine if I think only about the value or about the all the factors in **CPR rule 44.4**.

45. I have considered that the Employment Appeal Tribunal remitted the matter to me to reconsider the question of proportionality because the Employment Appeal Tribunal was not satisfied as to the weight that Employment Judge Heap had attached to the value of the claim.

46. I accept what the Respondent says on this issue: that I cannot look at the pure question of the value in isolation. That would be artificial. Instead I must consider all the factors. I have come to this conclusion for the following reasons.

47. **CPR rule 44.4** does not set out any arithmetical approach to be given to the factors or how much weight is to be attributed to any one factor in relative to the other. What it sets out is a list of factors to consider. In any given case some factors may be more important than the others. Ultimately

it is an objective judgement based on all the relevant factors of the case before the Tribunal.

48. I derive some support (albeit with caution because they concern a different rule) in that view from two cases in the County Court. One is **Reynolds v One Stop Stores Limited** decided on 29 August 2018 (a case that Dr Gosalakkal very helpfully drew to my attention). This is a decision of His Honour Judge Auerbach in the County Court at Norwich. He was considering the post-1 April 2013 **CPR rule 44.3(5)** which is similar in the way it lists the factors to consider and similarly does not appear to prescribe a mathematical approach or that one factor carries more weight than another. In paragraphs **[70]-[72]** he makes the point I have made above about the interpretation. Honour Judge Dight CBE and Master Wavlin in May **and others v Wayval Group Limited** on 21 December 2017 in the County Court at Central London at paragraph 55 made a similar point.

49. I see no reason why **CPR rule 44.4** would be approached differently. I can find no case to support the suggestion it should be approached differently.

50. I can see no other realistic option. The factors are taken together and weighed against each other according to the rules. It would be artificial and misleading in the extreme to consider only one factor and wilfully refuse to consider any other factor. A factor may not be relevant or may carry little weight but that is a different thing.

51. Dr Gosalakkal has very helpfully provided me with a copy of the Employment Appeal Tribunal's decision on 2 October 2019 when the Tribunal finally disposed of his appeal and remitted it back to the Employment Tribunal. Dr Gosalakkal drew my attention to paragraph 8 of the Employment Appeal Tribunal's reasons where it says as follows:

"Proportionality. The sums involved in the application for costs are considerable. It will be proportionate for remission to be a different Employment Judge. As we have already concluded a savings of time by virtue of retention of the same Employment Judge would not great. There may be some additional costs, key documents may have to be copied for the new Employment Judge but we think that remission or a different would be proportionate."

52. Dr Gosalakkal suggested that the Employment Appeal Tribunal had ruled the costs were disproportionate. Reading that paragraph as a whole and as a part of the reasons to the Employment Appeal Tribunal's order, it seems to me that the introductory word "proportionality" is addressed to the question of whether or not it should be remitted to the same or different Judge and is not a comment on whether or not the figures of just over £95,000 is itself proportionate or disproportionate to the claim. The fact that the Employment Appeal Tribunal remitted the matter rather than deciding it for itself clearly leaves it open to me as the Employment Judge to make my own decision.

53. It is a fact that the sums involved in the application for costs are considerable. It is not an observation that the costs are therefore disproportionate or should be considered disproportionate. That remains an issue for me to determine after considering the **CPR**.

Application of CPR rule 44.4 to the case

54. I turn then to the individual factors in **CPR rule 44(4)**. Having heard the submissions of the parties and considered the documents to which I have been referred these are my conclusions.

Conduct

55. I consider there is little criticism to be made of either party in this regard.

56. The history of the case to which I have already alluded is that this claim began on 7 January 2012. It is right that until 3 May 2013 there were at least one order for further and better particulars and two further case management discussions to try and clarify the claim. The Claimant was represented by Irwin Mitchell from 19 April 2013.

57. There is nothing in that which strikes me as being out of the ordinary. People who find themselves in Dr Gosalakkal's position often find it difficult to explain claims and Tribunals do their best to assist them to formulate it in legal terms but without straying into running their cases for them.

58. At the Preliminary Hearing on 3 May 2013 the Tribunal made a deposit order. Employment Judge Heap clearly considered there was nothing untoward before that because she ordered that no costs incurred before 27 May 2013 which is the date by which the deposit had to be paid. That means the Tribunal has already determined that conduct before that date is not unreasonable. I cannot see how logically costs before that date could be unreasonable for the purposes of proportionality but not for the purposes of deciding to make a costs order. There is no reason to believe the word would have a different meaning in the different contexts.

59. I have also taken into account that it seems that the parties did try to negotiate in the matter. Dr Gosalakkal through his solicitors Irwin Mitchell put forward an offer to settle that was reasonable. Shortly after the Preliminary Hearing on 3 May 2013, Dr Gosalakkal's solicitors contacted the Respondent's solicitors Browne Jacobson by telephone and made orally an offer to settle for about £48,000. In rough terms this is about 40% of the losses that Dr Gosalakkal was seeking to claim. This is clearly a genuine offer and a reasonable step on his part.

60. There were then a series of e-mails exchanged between the parties discussing the issue of settlement. Everything came to a halt when the Respondent realised that if they were to settle the case they would require the approval of HM Treasury because they are a public body. At that time HM Treasury were not prepared to approve any settlement in any whistleblowing claims within the NHS. Therefore, the matter could not proceed to a settlement because HM Treasury's approval which was necessary was always going to be withheld.

61. I do not think the respondent is unreasonable for abiding by HM Treasury's guidelines. As a public body paid for ultimately out of HM Treasury's funds, it clearly had to do so. At the time it was obvious from the news media there was public concern about how the NHS generally responded to whistleblowing claims. The policy was a reaction to that. I am not able to say such a policy on the respondent's side was unreasonable.

62. I have noted that at one point Dr Gosalakkal's case was struck out for failure to comply with an unless order on 13 June but on 3 September the matter was restored. That seems to me to be one of the unfortunate things that occurs in litigation. Whatever the fault it does not seem to me to such a factor that weighs heavily against Dr Gosalakkal in this case.

63. I have taken into account into conduct was that the schedule of loss was increased by Dr Gosalakkal on 15 January 2014 from £116,425 to £2,234,448. In submissions today, Mr Gosalakkal described this as in essence an emotional reaction on his part to what was going on at the time.

64. In the circumstances I do not believe it made any difference to how this case progressed.

65. It is quite apparent from the negotiations that the Respondent would have required HM Treasury's approval to settle on any terms and that was not going to be forthcoming.

Value of the claim

66. Whilst the schedule of loss is something relevant to valuing a claim it seems clear to me that no one would ever have really have thought this was a claim worth £2,234,448. That is quite apparent from considering the issues and from considering the likely remedies available to Dr Gosalakkal if he were to succeed in whole.

67. Based on the Respondent's difficulties with settling any case because of Her Majesty's Treasury's refusal to endorse any settlement in whistleblowing claims within the NHS it does not seem to me it has made any difference whatsoever on how this case has been conducted.

68. Besides I doubt that when the Respondents received the schedule they changed in any material way how they were conducting or going to conduct the litigation.

69. It would of course have been better if Dr Gosalakkal have not sent that schedule. It did not though alter the course or outcome of the case. This case was always seen to be as worth £116,425 in value or thereabouts. That is a value that is reasonable to put on the case because that is the one that has been prepared by Dr Gosalakkal's solicitors on his instructions and therefore has had the input of professional lawyers who are experienced in employment law on it.

Importance of the matter to the parties

70. This is a case that is of significant importance to both parties.

71. Dr Gosalakkal's professional reputation was on the line. There was undoubtedly a real risk, if not a reality, that if he lost the case then for all practical purposes he may have been unable to work in the United Kingdom. While each constituent country has its own health service, the NHS to all intents and purposes is a national provider of healthcare and is a large and significant employer of most healthcare staff in the country. Furthermore, if he genuinely believes that he had made a protected disclosure, it was important from his point of view to ensure that his

treatment by the NHS because of his making a protected disclosure was exposed.

72. From the Respondent's point of view, one can make pretty much the same points. It was important for the Respondent to show that they did not mistreat their staff because that would have an impact on the ability to retain staff and to recruit good staff in the future. It also seems to me that in the context of this case, the staff in the paediatric department were not getting on very well. Discordant relationships clearly had a potential impact on the safety of the department. The need for the respondent to show it took such issues seriously and dealt with them firmly would reassure the staff and public. It was also important for the respondent to show to the public it did not mistreat those who made protected disclosures considering the concern about the NHS's treatment of such workers previously.

Complexity

73. This is not legally a particularly complex case. It is true that claims relating to protected disclosures can become somewhat technical but those points do not in my view make this legally complicated.

74. It is the facts however that make it complicated. Upon reading the decision of the Tribunal presided over by Judge Ahmed it is clear that Dr Gosalakkal alleged as he had been subjected to 16 detriments because of making 17 protected disclosures and that he had been automatically unfairly dismissed because of those protected disclosures. He also made allegations of breach of contract and an allegation of ordinary unfair dismissal.

75. It is true that the detriments were dealt with very quickly at the beginning of the hearing on the basis that they turned out to be out of time.

76. However, the protected disclosures would still be something that would have been relevant to the Tribunal in determining the question of ordinary unfair dismissal and the protected disclosures are clearly relevant to determine the issue of automatic unfair dismissal.

77. The number of allegations and the question of how they acted on the decision-maker's mind taken with the nature of the workplace in which they took place gave rise in my view to quite complex factual questions. A hospital setting which is certainly out of the ordinary employment setting and it is necessary therefore consider the processes that the NHS has to follow in situations when dealing with consultants.

Skill, effort, specialised knowledge and responsibility

78. Employment law is a specialised area. If further proof is required the fact that there is a specialist Tribunal to deal with employment cases and a further specialist Tribunal to deal with consequent appeals clearly shows that to be the case. It is a complicated area of law with multiple legal and common law causes of action that engage from time to time.

79. The requirement for specialist lawyers in my view is made out.

80. However, this is no ordinary employer. It is the NHS. That is a public body with specialist regulation, policies and procedures and whose work is of

significant interest to the public. The NHS interacts with the regulatory bodies. Knowledge of and familiarity with these factors assists.

81. The charges levied by Browne Jacobson to the Respondent fall significantly below the Supreme Court Costs Office ("SCCO") guideline rates for Nottingham as set in 2010. I also note that the rate of Mr Powell who was Counsel for the Respondent falls well below the rates that one would see even for the Attorney General panel for Civil Counsel in the Midlands both above 10 years call and above 5 years call. So, whilst the skill and effort is there as required, it has been charged for at a rate one might consider to be a below market rate. Therefore, even if this case were suitable for solicitors and counsel who were not specialists in NHS litigation, or employment law even, it is doubtful the rate of costs to the respondent would have been lower than those actually incurred.

Time spent on the case

82. There was some debate as to what was meant by time spent on the case.

83. It seems to me that the interpretation of time spent on the case is the time actually spent dealing with the litigation rather than how long it took to run from start to finish. The latter for example may mislead if a case had a long hiatus in its proceedings in which nothing much occurred.

84. Therefore, this involves for example taking into account how long the hearing took before the Tribunal and how much time was spent behind the scenes preparing for the case.

85. It was quite apparent from reading the Tribunal's decision that there are a significant number of witnesses in this case. I have seen for myself that the witness bundle itself discloses how many witness statements were prepared on behalf of the Respondent to deal with the allegations that Dr Gosalakkal brought before the Tribunal.

86. The hearing itself was originally listed to last for 15 days. It took 13 days because one of the lay members had personal issues as explained in the judgment. That is a lengthy trial.

87. The bundle itself also runs to some 1,900 pages which is a significant indication that a lot of time had been spent gathering and considering the relevant information (most of which will have been in the respondent's possession as employer).

88. There are also another 27 lever arch files in the respondent's possession which include correspondence and show again the significant amount of time spent on the case and with the claimant's correspondence.

89. This is all supported by the bill of costs itself.

The place where and the circumstances in which work or any part of it was done

90. The work was done in Nottingham, but as I have already observed the rates were below those of the SCCO guideline rates for 2010.

91. As for the fact it took place in the Employment Tribunal, we are one Tribunal and we do not have specialist lists.

92. Having considered those individual factors and taking a step back the things that strike me about this case are these:

92.1. The significant importance to both parties and the consequences of loss to both parties.

92.2. The number of allegations that were made that the Tribunal had to engage with in the setting of a NHS hospital added a complex factual element to it.

92.3. This was listed to take place during 15 days all which took place though it took only 13 because one lay member was unable to attend on 2 days.

92.4. The amount of time required to deal with the case on the respondent's side was significant.

92.5. It is perfectly reasonable to have needed their specialist employment lawyers in this case but they were based locally tot eh Tribunal and the rates were below the guideline rates for 2010.

92.6. There does not seem to be any misconduct on either party's side that takes me one way or the other.

92.7. I note that this is a case of comparatively low value but the importance complexity and the length of the hearing in my view significantly outweigh the question of the value of this case.

93. In my view the bottom line figure of £95,176.07 it is a proportionate figure in this case. It compares favourably with the costs that one might incur in a similar case of similar length and complexity in the County Court.

94. For that reason, I see no reason to therefore engage in a detailed analysis of the items which Employment Judge Heap dealt with at the previous detailed assessment hearing.

The disentanglement issue

95. As I have noted on 9 June 2015 Employment Judge Heap ordered that:

95.1. it was appropriate to make an order for costs in favour of the Respondents on the grounds of unreasonableness in respect of the complaint of detriment and automatic unfair dismissal because of making protected disclosures, but

95.2. there would be no order for costs in respect of

95.2.1. the ordinary unfair dismissal claim

95.2.2. the claim for breach of contract, and

95.3. in any case there will be no account taken of costs that the respondent incurred before 27 May 2013.

96. The costs incurred before 27 May 2013 have been stripped out of the figures I have been dealing with already.

97. The task before me was probably best summarised by Simler J in an earlier appeal in this case:

"at the detailed assessment the Judge conducting the detailed assessment will have to disentangle those costs which are only attributable to whistleblowing complaints or only attributable to ordinary unfair dismissal complaints and if and to the extent the costs are attributable to both will have to make some form of apportionment."

98. I have concluded I must approach this with what might be described as a broad brush.

99. I believe that such an approach is justified by the Employment Tribunal's rules for the following reason

99.1. The overriding objective in **ET rule 2** requires me so far as practicable to deal with cases in a way that is proportionate to the complexity and importance of the issues and to avoid delay so far as compatible with proper consideration of the issues and of course save expense. If I have to drill down into the individual matters I clearly would not be complying with the overriding objective because of the amount of time, formality and expense that would be required of the Tribunal and the parties.

99.2. The principles of the **CPR** are governed by the overriding objective in the **CPR** itself. **CPR rule 1.1(2)** provides so far as relevant similar things to overriding objective in the **ET rules**.

99.3. From a practical point of view, it is at best very expensive and time consuming to analyse each item to decide where it falls. In many cases it may not be possible.

99.4. Such an approach appears also to be within the spirit of the order made by Employment Judge Heap and the observations of Simler J.

100. In paragraph [36] of its decision the Employment Appeal Tribunal remarked that when deciding in a case of ordinary unfair dismissal under **Employment Rights Act 1996 section 98**, whether a dismissal is fair or unfair

100.1. depends on the circumstances including the size and administrative resources of the employer's undertaking,

100.2. whether the employer has acted reasonably or unreasonably in treating the reason for dismissal as a sufficient reason for dismissing the employee,

100.3. that the fairness and unfairness must be determined in accordance with the equity and substantial merits of the case, and that

100.4. there is no burden of proof when considering the merits under **section 98(4)** but there is a burden of proof on the Respondent to establish a potentially fair reason for dismissal before one gets to that stage.

101. At paragraphs [37]-[38] the Employment Appeal Tribunal said:

"The Employment Tribunal is expected to review all aspects of a dismissal in a case where the reason for dismissal is in dispute or have to evaluate and make findings as to the evidence given on this question. If the reason for dismissal relates to conduct the Tribunal will then consider the investigation, disciplinary process, the findings made by the employer and the sanction adopted by the employer."

"It will apply at every stage the standards of a reasonable employer recognising that in some circumstances there may be a range of ways in which a reasonable employer may act. It is usually called the range of reasonable responses test."

102. At paragraph [38] the Employment Appeal Tribunal added that there are two dangers for a Tribunal to avoid:

102.1. The first danger is that the Tribunal may substitute its own finding for that of the employer forgetting in some circumstances there will be more than one course of act an employer can reasonably take.

102.2. The second is that the Employment Tribunal may adopt too lax an approach to the range of reasonable responses test.

103. It said that it is well established the standard of review is higher than the **Wednesbury** unreasonableness test. An Employment Tribunal is expected to engage carefully the different aspects of the dismissal process and apply objectively, reasonable standards to the **section 98(4)**. What is reasonable may depend on what is at stake. More may be expected of a reasonable employer where the allegation is a misconduct or the consequences to the employee if they are proven will be particularly serious.

104. I have already summarised the case, but the Employment Appeal Tribunal did so also. Without repeating it, it is quite clear that the Tribunal found as a fact that

104.1. there was a serious clash of personalities in the paediatric department at the respondent;

104.2. matters came to ahead in about 2010 after the first report commissioned into the matters;

104.3. Dr Gosalakkal was unhappy with the contents of that report and then he wrote derogatory tweets on Twitter;

104.4. this resulted in further reports and on 7 February 2011. That is when he was excluded from his position because of the breakdown in relationships.

104.5. Dr Gosalakkal used a social networking site to make defamatory statements, a continued use of e-mails in an unacceptable manner and a refusal to engage in a way forward with the review being conducted by external consultants.

104.6. Matters then progressed to a disciplinary process in which there are six allegations; only five of which were found proven but which covered both matters before and after February 2011 when he was excluded.

104.7. Dr Gosalakkal alleged he made several protected disclosures which the Tribunal concluded either were not made or were made in bad faith.

104.8. The Tribunal thought it was quite apparent that this is a case with a complex pre-history to disciplinary proceedings because his ultimate allegation was the reason for his treatment at their hands was essentially because he was being picked upon by his colleagues.

105. The Respondent's position is that the bulk of this case concerns the whistleblowing allegations and that should be reflected in the amount by which I reduce the amount of costs that Dr Gosalakkal must pay to them and they put forward a figure of 30%. They suggest a figure of 50% or more would be wrong in law.

106. Dr Gosalakkal unsurprisingly takes a very different point. He says when one looks at the case the questions raised would have had to have been gone through in any event and therefore he should pay only 10% of the costs. Dr Gosalakkal however accepted in his submissions voluntarily that the primary part of his case was the protected disclosure elements and that the claim of ordinary unfair dismissal and breach of contract were ancillary to his main claim.

107. In my opinion a reduction of the costs in this case should be of the sum of 50%. I have come to that conclusion for the following reasons.

107.1. Even if this had been an ordinary unfair dismissal claim without the claims for protected disclosure and consequent detriment or automatic unfair dismissal a hearing would have been necessary in any event. It would have been necessary as part of that hearing to engage in detail to understand the facts preceding the exclusion in February 2011. Those allegations of difficulties between members of staff and allegations that Dr Gosalakkal had made complaints would clearly be relevant even to the question of ordering unfair dismissal because they would go to the question of whether or not the genuine reason for dismissal was misconduct or as an alternative some other substantial reason. That would have resulted in a lengthier than normal hearing. It would also have resulted in the bundles pretty much the same size as that which has been produced before the Tribunal.

107.2. There was also a claim here for wrongful dismissal and Employment Judge Heap did not find that that claim was unreasonable. Any claim for wrongful dismissal requires a Tribunal to engage in a fact-finding exercise as to what has actually happened in order to determine if objectively the Respondent has proven that the Claimant has fundamentally breached his contract of employment. That means therefore that a lot of the evidence put before the Tribunal would still have had to have been considered in detail by the Tribunal as part of the hearing in order to make those findings of fact.

107.3. Although the necessity to cover the history would be present, there would not be the same level of investigation. The focus would be on the decision-maker's mind, the investigation and on the motive for any information fed into the dismissal process.

107.4. Documents that have been lodged before the Tribunal and a lot of the work done in this case would have been necessary.

108. The protected disclosures have been the primary focus of Dr Gosalakkal's claim and what drove it. The alleged protected disclosures required the respondent and the Tribunal to engage in greater detail with what happened (e.g. what was actually disclosed, whether it fell within the legal definition, whether there was a consequential detriment and whether it was the sole or principal reason for dismissal) that otherwise might be the case. In my view it widened significantly the factual matrix into which the Tribunal had to enquire in order to determine the various questions that need to be answered.

109. It required therefore the Tribunal to embark upon a greater and in-depth study of the evidence to determine what the facts were. Notably the focus would no longer be on the decision-maker's motivation but also on Dr Gosalakkal's motivation because the question of whether any protected disclosures were made in good faith or at all now fell for consideration. It resulted in a significant increase in the factual issues that need to be addressed in the witness evidence and in the matters which then had to be pursued before the Tribunal.

110. The protected disclosure allegations probably doubled the length of the trial in any case it significantly increased it.

111. It is a very difficult exercise to split these things out into any detail but it seems to me on a broad-brush approach, a 50% reduction represents an appropriate and fair split of the amount between the costs which are attributable to unreasonable conduct and the costs which are not attributable to unreasonable conduct. Therefore, that is the order that this Tribunal will make.

Conclusion

112. Halving the costs figure and then making an allowance for the £500 deposit that Dr Gosalakkal paid as a condition of continuing his claim, the amount of costs that Dr Gosalakkal owes to the respondent is £47,088.04.

Costs of the hearing

113. The respondent claims the costs of the hearing in the sum of £5,531.50. I have considered the costs schedule that the respondent has filed. The assessment is to be done summarily and is a broad-brush approach.

114. The respondent concedes that the refresher for Counsel for tomorrow must be taken out. That is reflected in the figure claimed.

115. I am assessing them on the standard basis. Doubt must be resolved in Dr Gosalakkal's favour. I have applied my mind to the factors in **CPR rule 44.4** and consider that the factors that stand out are the importance to the parties and the value of the costs. Observations I have made about the rates

claimed apply equally here. I do not consider Mr McGee's brief fee is excessive for the amounts claimed and when considering suggested rates in various parts of the High Court as set out in the SCCO guideline rates for 2010. There is nothing about the time spent that causes me concern. I am satisfied £5,531.50 is reasonably incurred and reasonable in amount and overall proportionate to the issues I had to determine today.

Employment Judge Adkinson

Date: 18 March 2020

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

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